

**BEFORE THE ARBITRATOR**

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In the Matter of the Arbitration Between

**STATE OF MINNESOTA**

**Perpich Center for the Arts**

and

**STATE RESIDENTIAL SCHOOLS EDUCATION  
ASSOCIATION**

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BMS Case No. 14 PA 0239

Grievant:

**Arbitrator: Sharon K. Imes**

***APPEARANCES***

**Chrisanne L. Nelson**, Minnesota Management and Budget, State of Minnesota, appearing on behalf of the State of Minnesota and its Perpich Center for the Arts.

**Deborah Corhouse**, Education Minnesota, appearing on behalf of the State Residential Schools Education Association and the Grievant.

***JURISDICTION***

The State of Minnesota, referred to herein as the Employer, and the State Residential Schools Education Association, referred to herein as the Union, are parties to a collective bargaining agreement effective July 1, 2013 to June 30, 2015. Under this agreement, the undersigned was selected to decide a dispute that has occurred between them. Hearing was held on August 29, 2014 in Golden Valley, Minnesota. The parties, both present, were afforded full opportunity to be heard. The hearing was closed with oral arguments and the matter is now ready for determination. At hearing, the parties granted the arbitrator an extension of time, if needed, in which to issue the decision.

***STATEMENT OF THE ISSUE***

Did the Employer have just cause to issue a three-day suspension to the Grievant? If not, what is the appropriate remedy?

**RELEVANT CONTRACT LANGUAGE**

**ARTICLE 16 – DISCIPLINE**

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**Section 2. Disciplinary Action.** Disciplinary action shall be imposed on teachers only for just cause.

- A. Discipline shall include only the following, but not necessarily in this order:
  - 1. Oral reprimand (not arbitrable), or
  - 2. Written reprimand, or
  - 3. Suspension, or
  - 4. Discharge

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**Section 6. Personnel File.**

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Materials placed in the employee’s personnel file, upon the employee’s request and by a showing of the employee that such material is incomplete, inaccurate, or false are to be immediately expunged from the file.

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**ARTICLE 17 – GRIEVANCE PROCEDURE**

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**E. Step 5. Arbitration.**

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**Section 3. Fees and Expenses.** Each party shall be responsible for equally compensating the arbitrator for his/her fee and necessary expenses. If either party desires a verbatim record of the proceedings, it may cause such a record to be made, provided it pays for the record, and the other party may then obtain a copy at the cost of the prescribed by the transcriber or his/her service agreement, whichever is less.

**Section 4. Arbitrator’s Authority.** The Arbitrator shall have no right to amend, modify, nullify, ignore, add to, or subtract from the provisions of this Agreement. He/she shall consider and decide only the specific issue or issues submitted to him/her. The arbitrator’s decision shall be binding on all parties to the dispute unless the decision is contrary to, inconsistent with, or modifying or varying in any way the application of laws, rules, or regulations having the force and effect of law. The decision shall be based solely upon the arbitrator’s interpretation and application of the expressed terms of the Agreement and to the facts of the grievance presented. The decision shall be issued to the parties by the arbitrator and a copy shall be filed with the Bureau of Mediation Services, State of Minnesota. The arbitrator shall submit his/her decision in writing thirty (30) calendar days following the close of hearing or the submission of briefs by the parties, whichever is later, unless the parties agree to an extension.

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**ARTICLE 30 – MANAGEMENT RIGHTS**

It is recognized that, except as expressly stated herein, the Employer shall retain whatever rights and authority are necessary for it to operate and direct the affairs of the Employer in all of its various aspects, including but not limited to, the educational policies of the Employer; the right to direct the teachers, to plan, direct, and control all the operations and services of the Employer; to determine the methods, means, organization, and number of personnel by which such operations and services are to be conducted; to assign teachers; to transfer teachers; to schedule working hours; to evaluate teachers; to determine whether goods or services should be made or purchased; to hire, promote, suspend, discipline, discharge, or relieve teachers due to lack of work or other legitimate reasons; to make and enforce reasonable rules and regulations that are uniformly applied and uniformly enforced; and to change or eliminate existing methods, equipment, or facilities. Any term or condition of employment not specifically established by this Agreement shall remain solely within the discretion of the Employer to modify, establish or eliminate.

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***OTHER RELEVANT DOCUMENTS***

**SECTION 504 PLAN  
CONFIDENTIAL**

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**CLASSROOM ENVIRONMENT AND ACADEMIC SUPPORT ACCOMODATIONS**

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- 9. Teachers will update SchoolView at least weekly to allow . . . (the student) and parents access to view . . . (the student’s) attendance and academic progress.
- 10. Teachers will reply within two (2) school days to parent inquiries regarding academic progress and will contact parents of any notable physical or behavior changes and if multiple assignments are missing (i.e. a pattern is forming and growing).

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**OCR**  
Office of Civil Rights

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**Protecting Students With Disabilities**

**Frequently Asked Questions About Section 504 and the Education of Children with Disabilities**

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**9. What des noncompliance with Section 504 mean?**

A school district is out of compliance when it is violating any provision of the Section 504 statute or regulations.

**10. What sanctions can OCR impose on a school district that is out of compliance?**

OCR initially attempts to bring the school district into voluntary compliance through negotiation of a corrective action agreement. If OCR is unable to achieve voluntary compliance, OCR will initiate enforcement action. OCR may (1) initiate administrative proceedings to terminate Department of Education financial assistance to the recipient; or (2) refer the case to the Department of Justice for judicial proceedings.

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### ***BACKGROUND AND FACTS***

The Golden Valley campus of the Perpich Center for the Arts houses the outreach and professional development group, the Perpich Arts High School and the Perpich Arts Library. The Perpich Arts High School, open to all 11<sup>th</sup> and 12<sup>th</sup> grade Minnesota students, is a tuition-free public high school which delivers a comprehensive education centered in the arts. Students living in the Twin Cities area usually commute while those from the greater Minnesota area live in a supervised residence hall on campus. The Grievant in this dispute, licensed in social studies, has taught at the High School for nearly 18 years and was assigned to teach introductory art history classes and museum studies classes in 2013.

On March 13, 2013, the Grievant participated in a Section 504 meeting regarding a particular student and was informed by the 504 plan coordinator at that meeting that he would be required to update SchoolView, an online system that allows parents to view the student's attendance records and academic progress, on a weekly basis. The 504 plan also called for the Grievant to reply to parent inquiries regarding the student's academic progress within two school days and to contact parents if the student exhibited any notable physical or behavioral changes and if multiple assignments were missing.

On May 29, 2013, six days before the end of the school year, this student's parent sent the high school principal an e-mail stating that none of the student's assignments had been updated in SchoolView since before the end of the quarter and that because the information was not available it looked like the student was not passing the art history class even though the student claimed to be on track. Upon receiving this e-mail, the Principal forwarded it to the Grievant and asked for information from him so she could respond to the parent that day. In the next hour, a number of e-mails were exchanged between the Grievant and the parent. Following is a content summary of those e-mails:

- At 7:43 the Grievant sent the parent an e-mail asking the parent to send him a copy of any communications to him that had been sent in the last month.
- At 7:54 the parent responded that the messages could be forwarded but that the parent's primary concern was about access to SchoolView since the administration had assured the parent that it would be updated. In that e-mail, the parent added that the parent was concerned over the student's progress in the class and whether year-end requirements for the class would cause the student to become stressed and affect the student's health.
- At 8:02 the Grievant replied that he had promptly replied to the parent each time the parent had contacted him and that his records showed the parent had last contacted him on May 2. He also asked, in that e-mail, why the parent had not directly contacted him if there was a concern about the student's grade and stated that he was confused.
- At 8:15 the parent replied that because of concern over the student's health when under stress they were trying to teach the student better time management and then went on to say that the inquiry about SchoolView was because the parent had been told by management that the information would be on it; that SchoolView was the method they had been encouraged to use, and that it had not been updated. Further, the parent stated that staff had encouraged them to contact the Principal about this and that the contact should not have been made. Then, the parent offered to call the Principal and tell her that the Grievant had been great about communicating with them when asked in other ways and that they should have been content without SchoolView. And, finally, in closing the e-mail, the parent asked the Grievant not to take this out on the student or the student's grade.
- At 8:39 the Grievant responded that he would contact the Principal and tell her that the parent had last contacted him about the student's grade on May 2 and that that should clear up the parent's statement in the e-mail to the Principal about attempts to determine the student's progress from the Grievant. Further, in response to the parent's request that he not take out their e-mail exchange on the student, the Grievant wrote that he had been a teacher for twenty-one years; that the day he would use a student's grade as a means of retribution for issues with a student or the student's parents would be the day he would no longer teach and that he was not that kind of teacher or person.

Apparently, the next e-mail, addressed to both the Principal and the Grievant, was sent by the parent at 10:14. Prior to that, however, the Principal asserts that the parent called her at approximately 8:50 and was in tears. The content of that conversation was not discussed but, according to the Principal, the result was that she sent the Grievant an e-mail at 9:00 a.m. advising him to see her when he arrived at school. At 10:17, the Grievant sent an e-mail to her stating that he had stopped in at 10:20.

At 10:14 a.m., the e-mail addressed to both the Principal and the Grievant which the parent sent stated the parent's concern over SchoolView not being updated "was not intended to become personal in any way"; that concern over the lack of update was based on being told

that SchoolView was “the best way to keep track of things”; that there was no concern over “any teacher inattention to my inquiries”, and that the parent’s concern over the lack of an update should not have been phrased that way in the parent’s earlier e-mail. The parent added that as far as the parent was concerned the SchoolView issue was “an administrative issue” and that the parent was “sorry” if “the complex e-mail exchange became personal”. At 10:34, the Grievant responded to this e-mail by thanking the parent and telling the parent he would get back to the parent yet that day.

At 12:09 p.m., the Grievant sent the parent an e-mail stating that he had spoken to all the students who owed work and the student was on track as he had asserted; that the student was on target for an A; that as of the date of the e-mail he had finished all his homework assignments and only owes two essays which the Grievant anticipated would be completed sometime in the following week. The Grievant also said that if the student did not remain on track he would contact the parent. This e-mail was followed by an e-mail from the Grievant to the Principal at 12:27 in which he attached the 12:09 e-mail he had sent to the parent and stated that he assumed “this clears up everything” and he no longer needed to meet with her.

Earlier, however, following the earlier exchange of e-mails, the Principal contacted a Human Resources consultant from the State’s Department of Administration to conduct an investigation into the matter. The investigative report, submitted on June 10, 2013, outlined several of the e-mails exchanged between the parent and the Grievant; summarized an interview with the Grievant conducted on June 3, 2013; indicated both the Principal and the 504 Coordinator had been interviewed, and made three findings. They are as follows: 1. That the Grievant did not update the student’s SchoolView website as required by the student’s 504 plan and that if there had been a complaint the school could have been found to be out of compliance with the federal disability statute; 2. That the Grievant failed to provide the Principal with information about the student’s status when asked by her for it and contacted the parent, instead, and that his explanation that he did so because he thought he had missed a communication from the parent was not credible, and 3. That the Grievant’s communications with the parent were inappropriate since he placed the blame on the parent for failure to

communicate with him and did not provide either the parent or the Principal information to explain his failure to update the website.

Following receipt of this report, the Principal, on June 11, 2013, sent the Grievant a memo informing him that the investigation had been completed and that based upon its findings he was being suspended for three days effective June 12-14, 2013. The reasons cited for the suspension included failure to enter a student's grades into SchoolView as required by the student's federal Section 504 Plan and the Grievant's response when the Principal had asked about this. More specifically, the Principal explained that the Grievant had been told on March 13<sup>th</sup> that he was to update SchoolView at least weekly; that when asked for information about the student he did not respond to the request but directly contacted the parent, and that the tone of his communications with the parent was inappropriate since he attempted to shift responsibility to the parent for a failure to communicate the status of the child's progress. The memo went on to advise the Grievant that since he had been coached regarding his communications with others a number of times and had also received a written reprimand on February 3, 2013 for inappropriate and disruptive communications progressive corrective action was necessary.

The disciplinary action was grieved on June 24, 2013 and the Union alleged on behalf of the Grievant that the action was not for just cause. As remedy, the Union seeks that the three-day suspension be expunged and that the Grievant be made whole. The grievance was denied at all three steps of the grievance procedure and is now before this Arbitrator.

#### ***ARGUMENTS OF THE PARTIES:***

The Employer maintains it has just cause to issue the Grievant a three-day suspension since he failed to follow directives by failing to update the student's academic progress on SchoolView for eleven weeks, a violation of federal law, and when he failed to follow the Principal's directive to contact her with information about the e-mail she had received and, instead, contacted the parent directly. According to the Employer, the Grievant knew he was responsible for updating SchoolView since he was given a copy of the student's 504 plan and told to update SchoolView at least weekly at a meeting on March 3, 2013. The Employer also states that the Grievant's inappropriate communications with the student's parent and the fact

that he was disciplined for similar misconduct four months earlier and in January 2012 further justifies the degree of discipline imposed. As additional support for its position, it asserts that the Grievant was given two letters of expectation that also referenced the need for better communications earlier.

The Union, however, argues that the Employer has elevated form over substance in this dispute and that the identified problem easily could have been remedied with a reminder rather than a three-day suspension. It also maintains that the discipline is too severe since the Grievant's communications with the parent were respectful and cites the fact that the parent apologized for any stress caused by the inquiry as support for its assertion. Further, the Union declares that there is no evidence that the Grievant received either a specific or explicit directive regarding the need to update SchoolView and asserts that while the Grievant should have read the 504 plan he did not and, therefore, he was not aware of the requirement. It also charges that the Grievant's supervisors did not remind him of the need to update SchoolView.

Continuing to assert that a three-day suspension is too harsh the Union declares that the discipline should be rescinded since the Employer treated the Grievant's failure to update SchoolView as an act of defiance rather than a lack of knowledge. As remedy, it seeks not only that the discipline be rescinded but urges that if discipline is warranted a reminder or oral reprimand is sufficient. The Union also rejects the Employer's assertion that the Grievant has a history of communication problems and seeks that the information it considers false and inaccurate in the disciplinary memo be expunged or changed as is provided for under the collective bargaining agreement. As support for its position, it states there is no evidence that the Grievant was coached for this problem and asserts that the Employer's effort to keep the Grievant from talking with his colleagues about work-related problems violated 17A.06 Mn. Stats.

### ***DISSCUSSION***

In every discipline case before an arbitrator the employer, first, must prove that the employee did that which was alleged and, secondly, that the seriousness of the proven misconduct warranted the degree of discipline imposed. Further, for just cause to warrant discipline, the employer must show that the discipline was imposed for the misconduct alleged

and that a fair procedure was followed when the discipline was administered. In this case, the record confirms that the employer conducted an adequate investigation prior to imposing discipline for the misconduct. It does not prove, however, that the Grievant did all that was alleged or that the seriousness of the misconduct warranted the degree of discipline imposed.

According to the Employer, the Grievant was issued a three-day suspension without pay as progressive discipline for failing to update SchoolView as required by the student's 504 plan; for directly contacting the parent instead of providing information to the Principal about the student's progress as requested, and for sending the parent e-mails which the administration concluded were attempts to place the blame for the communication failure upon the parent. After reviewing the record, it is concluded that there is just cause to discipline the Grievant for failing to update SchoolView as required by the student's 504 plan. The evidence does not support a finding, however, that the Grievant ignored the Principal's request for information; that the Grievant was directed not to contact the parent, or that the Grievant's e-mails were inappropriate and attempted to shift blame for the communication failure to the parent.

While the parties differ over whether the Grievant knew he was required to update SchoolView, there is no dispute that he did not update the website for nearly eleven weeks. Further, even though there is some debate about whether the Grievant was orally instructed to update the website, there is no dispute that the Grievant was given a copy of the student's 504 plan which clearly states that the Grievant was to update SchoolView on a weekly basis and that the Grievant knew he was to comply with the 504 plan. Given this fact, there is no question that the Grievant ignored this responsibility and that there is just cause to discipline the Grievant for his failure to update the website on a regular basis.

As stated before, however, there is not sufficient evidence to support a finding of just cause for the other charges leveled against the Grievant, charges which resulted from an exchange of e-mails between the Grievant and the parent and the Grievant and the Principal on May 29, 2013. The exchange began when the parent contacted the Principal by e-mail to complain about not being able to view the student's progress in the Grievant's class on SchoolView because the website had not been updated. Unfortunately, the complaint was not well-stated. In that e-mail, the parent stated the complaint as follows: "None of the

assignments have been updated since before the end of the quarter, so despite by attempt to find out where . . . (the student) is at from . . . (the Grievant), . . . (the student) looks like he is NOT passing that class.” While the parent is to be believed when the parent states that their only concern was the lack of information on SchoolView, the sentence suggests that the parent had attempted to get information from the Grievant and was not able to get that information from him.

Following receipt of this e-mail the Principal immediately forwarded it to the Grievant and asked him to provide some information to her so she “can respond back (sic) to her today”. This e-mail was also not very clear since it does not state whether she is seeking information about whether the Grievant had updated SchoolView as required by the student’s 504 plan or whether she was seeking information from the Grievant as to whether he had not provided information to the parent about the student when the parent had asked.

As with so many e-mails which are used as a substitute for a face-to-face exchange or a telephone call and which do not convey ideas clearly, the intent of the sender becomes clouded by the perception of the recipient who does not have the benefit of facial expressions or tone of voice to decode the meaning of what had been written and who also is not able to directly clarify the intent. In this exchange of e-mails, it is obvious that the Grievant read the parent’s e-mail as a suggestion that the parent had attempted to contact him and that he had failed to provide the parent with information about the student’s progress as the parent had requested and the comments made by both after that were interpreted based upon the perception of each rather than taken for face value. Much of this problem easily could have been avoided had the exchanges not occurred by e-mail.

After reading the e-mails the Grievant had exchanged with the parent, the Principal concluded, as did the investigator, based upon the same reading, that the Grievant’s e-mails had attempted to shift the blame for a communications failure to the parent and were, therefore, inappropriate. This Arbitrator’s reading of those same e-mails finds their conclusion not persuasive.<sup>1</sup> Instead, she finds that the Grievant’s reaction to the parent’s statement which

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<sup>1</sup> Neither the Principal nor the investigator had the benefit of tone or facial expression to reach their conclusion and nothing the Grievant stated in the e-mails which he sent indicates he was seeking anything more than information from the parent about when they had last communicated. Further, since the parent did not testify as

suggested he had not responded to inquiries made by the parent quickly turned what was initially meant to be a complaint about lack of information on the SchoolView website into an exchange between a teacher concerned that the parent was falsely accusing him of failing to respond to a parent inquiry, a far more serious offense than failing to update the website, and the parent becoming protective of the student. This is evidenced by the fact that the Grievant's first e-mail to the parent was a request that the parent send copies of e-mails the parent may have sent to him; by his statement that "every time" he had been contacted by the parent he had "replied in a prompt manner and his statement that his records showed he had last been contacted by the parent on May 2 and a request that the parent confirm this fact in his second e-mail to the parent. This finding is also supported by the fact that the Grievant highlighted the parent's statement "so despite my attempt to find out where he is at from . . . (the Grievant) and told the parent he would be telling the Principal that May 2<sup>nd</sup> was the last time the parent had contacted him about the student's progress in one of his e-mails. These comments strongly indicate the Grievant was most concerned about what he perceived as an allegation that he had not responded to the parent when the parent had contacted him to get information about the student and was not trying to place blame upon the parent for any communication failure.

The parent's responses, on the other hand, only seemed to indicate a concern over the fact that the parent had been told to view SchoolView as the means of following the student's progress and could not do so since it was not updated; a concern that the student might be failing the class, and a concern that if the student was not on track the stress of trying to catch up might affect the student's health. This is evidenced by the fact that most of the parent's e-mail sent at 7:54 and 8:15 a.m. addressed the lack of information on SchoolView and stated that out of concern for the student's health if he had too much to accomplish by year-end they were trying to teach the student better time management. This same concern about the student's well-being was reflected in the parent's request that the Grievant not take any of what had transpired between them out on the student or on the student's grade although nothing said by the Grievant suggested any possibility of that.

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to how the parent interpreted the Grievant's intent the findings regarding the intent of the senders must be determined solely by that which was stated and not by that which was assumed.

While it appeared that the Grievant had addressed the parent's concern about the student's progress and the possibility of retaliation in the e-mail he sent the parent at approximately 8:40 a.m., the parent sent the complete exchange of e-mails to the Principal at approximately 9:00 a.m. that day. While the parent's intent in forwarding the exchange to the Principal is unclear<sup>2</sup>, the Principal, upon receiving it followed up on the e-mail by sending the Grievant another e-mail directing him to see her when he arrived at school. Again, it is difficult to determine what the Principal intended when she directed the Grievant to see her when he arrived at school given the fact that the problem appeared to have been resolved but it appears that she was concerned about the e-mail exchange since she contacted the human resources consultant after receiving the e-mail and asked the consultant to conduct an investigation concerning the exchange.

While the Employer has suggested that this exchange of e-mails was inappropriate and cause for discipline, nothing in the e-mails suggests the Grievant's comments were improper or impolite. Further, the fact that each e-mail from the Grievant was closed with "Cheers" even when the parent expressed a concern that the Grievant might retaliate against the student, suggests that the Grievant intended the exchange to be helpful and friendly. Consequently, there is insufficient evidence to conclude that the Grievant's exchange with the parent warranted discipline.

Further, there is no evidence to support a finding that the Grievant failed to contact the Principal as requested that day. Instead, the record shows that the Grievant sent the Principal an e-mail at approximately 10:20 a.m. advising her that he had stopped to see her at that time (and, apparently, was not successful) and that the Grievant sent her a follow-up e-mail at approximately 12:30 p.m. which contained an e-mail the Grievant had sent the parent earlier advising the parent of the student's status. Given these two e-mails it cannot be concluded that the Grievant failed to contact the Principal, as directed at 7:20 a.m. that morning. Further,

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<sup>2</sup> While the Principal testified that the parent had called her "in tears" at about 8:50 a.m., the content of this e-mail suggests that either the parent did not believe the Grievant or the Principal was mistaken about the emotional well-being of the parent when they talked on the telephone. It is more likely that the latter is the case since the Grievant had told the parent that he was not the kind of person to retaliate against a student and since, without any further e-mail exchanges, the parent sent an apology to both the Grievant and the Principal approximately an hour later.

while the Principal expressed a concern that the Grievant had contacted the parent directly, nothing in her e-mail directed the Grievant to not contact the parent or to not resolve the problem so the Grievant's response to the Principal's initial e-mail was appropriate and does not establish just cause for discipline.

In finding there is just cause to discipline the Grievant for failure to update SchoolView as directed but not just cause to discipline him for the e-mail exchange between him and the parent or for failure to provide the Principal with the information she had requested, the degree of discipline to be imposed must be determined since the Employer's three-day suspension was for misconduct in all three areas and would be too harsh for the misconduct proven. The Employer, when deciding upon the three-day suspension suggested it was imposed as progressive discipline because the Grievant had been coached and had received both an oral and written reprimand for improper e-mail communications. Although the record does show that the Grievant received both an oral and written reprimand for improper e-mail communications and did not grieve the written reprimand<sup>3</sup> the testimony that the Grievant had been coached a number of times for this same problem is not persuasive. Given these facts it is concluded that the seriousness of the Grievant's misconduct does not warrant a three-day suspension. It is noted, however, that Grievant's failure to update the website, a website parents rely upon for information about student progress, for eleven weeks deserves more than a written reprimand as the Union has suggested. Accordingly, it is determined that the Grievant should receive a one-day suspension for this misconduct.

Based upon the record as a whole, the arguments of the parties and the discussion set forth above, the following award is issued:

#### **AWARD**

The grievance is denied in part and sustained in part. For failure to update SchoolView for eleven weeks while directed to do so weekly in the student's 504 plan, the Grievant's three-day suspension is reduced to a one-day suspension and the Employer is ordered to make the Grievant whole for any wages and benefits loss during two of the three days the Grievant was suspended. Further, the Employer is ordered to remove the memo explaining the reasons for

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<sup>3</sup> Under the collective bargaining agreement oral reprimands are not arbitrable.

the three-day suspension from the Grievant's personnel file. The Arbitrator retains jurisdiction for the purposes of implementing this remedy.

By: \_\_\_\_\_  
Sharon K. Imes, Arbitrator

October 15, 2014  
SKI